Supreme Court, U.S.
FILED
MAY 15 2002
CLERK

No. 01-1234

In the Supreme Court of the United States

JAY COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

25 pg

QUESTIONS PRESENTED

1. Whether the district court erred in declining to instruct the jury that, in order to find petitioner guilty of conspiring to violate the Wire Wager Act, 18 U.S.C. 1084(a), it must find that he acted with a "corrupt motive."

2. Whether the bookmaking activities for which petitioner was convicted were lawful under the "safe harbor" provision of 18 U.S.C. 1084(b).

3. Whether the district court erred in declining to instruct the jury that, in order to find petitioner guilty of a substantive offense under Section 1084(a), it must find that he knew his activities were in violation of federal law.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Bryan v. *United States*, 524 U.S. 184 (1998)	17, 18
Cheek v. *United States*, 498 U.S. 192 (1991)	17
Cohen v. *United States*, 378 F.2d 751 (9th Cir.), cert. denied, 389 U.S. 897 (1967)	17
Cruz v. *United States*, 106 F.2d 828 (10th Cir. 1939)	8
Fall v. *United States*, 209 F. 547 (8th Cir. 1913)	8-9
Hamburg-American Steam Packet Co. v. *United States*, 250 F. 747 (2d Cir.), cert. denied, 246 U.S. 662 (1918)	6
Keegan v. *United States*, 325 U.S. 478 (1945)	6, 9
Landen v. *United States*, 299 F. 75 (6th Cir. 1924)	8
Lescallett v. *Commonwealth*, 17 S.E. 546 (Va. 1893)	14
Liparota v. *United States*, 471 U.S. 419 (1985)	18
McQuesten v. *Steinmetz*, 58 A. 876 (N.H. 1904)	14
Morrissette v. *United States*, 342 U.S. 246 (1952)	18
People v. *Powell*, 63 N.Y. 88 (1875)	4, 5-6
People ex rel. Vacco v. *World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (Sup. Ct. 1999)	12
Sagansky v. *United States*, 358 F.2d 195 (1st Cir.), cert. denied, 385 U.S. 816 (1966)	13
Saratoga Harness Racing, Inc. v. *City of Saratoga Springs*, 55 A.D.2d 295 (N.Y. 1976)	14
Sterling Suffolk Racecourse Ltd. P'ship v. *Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir.), cert. denied, 510 U.S. 1024 (1993)	10-11

Cases—Continued: Page

United States v. *Barker*, 514 F.2d 208 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975) 8
United States v. *Blair*, 54 F.3d 639 (10th Cir.), cert. denied, 516 U.S. 883 (1995) 7, 9, 17
United States v. *Feola*, 420 U.S. 671 (1975) 4, 6, 7
United States v. *Leon*, 534 F.2d 667 (6th Cir. 1976) 7, 9
United States v. *Mack*, 112 F.2d 290 (2d Cir. 1940) 6
United States v. *Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990) 18
United States v. *Murray*, 928 F.2d 1242 (1st Cir. 1991) 7, 8
United States v. *Previte*, 648 F.2d 73 (1st Cir. 1981) 8
United States v. *Ross*, No. 98-CR.1174-1 (KMV), 1999 WL 782749 (S.D.N.Y. Sept. 16, 1999) 13
United States v. *Tomeo*, 459 F.2d 445 (10th Cir.), cert. denied, 409 U.S. 914 (1972) 13
United States v. *Thomas*, 887 F.2d 1341 (9th Cir. 1989) 7
United States v. *Truesdale*, 152 F.3d 443 (5th Cir. 1998) 14

Constitution and statutes:

N.Y. Const. 4
Interstate Horseracing Act of 1978, 15 U.S.C. 3001-3007 11
15 U.S.C. 3002(3) 15
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* 11
Wire Wager Act:
18 U.S.C. 1084 ..... 4, 10, 15
18 U.S.C. 1084(a) 2, 3, 5, 11, 15, 16, 17, 18
18 U.S.C. 1084(b) 3, 4, 5, 9, 11, 12, 13, 14, 16
7 U.S.C. 2024(b)(1) 18
18 U.S.C. 111 7
18 U.S.C. 371 ..... 2, 6
18 U.S.C. 1953 18

Statutes—Continued: Page

18 U.S.C. 1955 8
N.Y. Penal Law (McKinney 2000):
§ 225.00(3) 12
§ 225.00(4) 12
§ 225.00(5) 12
§ 225.05 12
§ 225.10 12

Miscellaneous:

Black's Law Dictionary (7th ed. 1999) 10
Edward J. Devitt, *Federal Jury Practice and Instructions* (4th ed. 1990) 8
H.R. Rep. No. 967, 87th Cong., 1st Sess. (1961) 10
2 Model Penal Code and Commentaries (1985) 8
Statement by President William J. Clinton Upon Signing H.R. 4942, 36 Weekly Comp. Pres. Doc. 3153 (Dec. 21, 2000) 15
Webster's Third International Dictionary (1993) 10

In the Supreme Court of the United States

No. 01-1234

JAY COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 260 F.3d 68.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2001. The petition for rehearing was denied on October 25, 2001 (Pet. App. 19a). On January 11, 2002, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 22, 2002, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to violate the Wire Wager Act, 18 U.S.C. 1084(a), in violation of 18 U.S.C. 371, and on seven counts charging substantive violations of the Act. He was sentenced to 21 months' imprisonment. The court of appeals affirmed. Pet. App. 1a-18a.

1. The evidence at trial showed that petitioner was president of World Sports Exchange (WSE), a sports wagering business located on the island of Antigua in the Caribbean. WSE targeted customers in the United States and promoted its business throughout the country by radio, newspaper, and television. Its advertisements invited customers to bet on American sporting events by toll-free telephone calls or over the Internet. Pet. App. 1a-2a.

WSE required new customers to open an account with the company and to wire $300 to that account in Antigua. A customer wishing to place a bet would do so by contacting WSE by telephone or the Internet. WSE would issue an immediate, automatic acceptance and confirmation of the bet, using funds from the customer's account to cover the bet. WSE would customarily retain a commission of 10% on each bet. Pet. App. 2a.

By November 1998, WSE had received 60,000 phone calls from customers in the United States, including 6100 from New York. In one 15-month period, the business collected approximately $5.3 million in funds wired by its customers in the United States. Pet. App. 2a.

2. Section 1084(a) makes it unlawful "knowingly" to transmit in interstate and foreign commerce (1) "bets or

wagers" on sporting events; (2) "information assisting in the placing" of any such bets or wagers; or (3) a communication "which entitles the recipient to receive money or credit as a result of bets or wagers." The statute contains a "safe harbor" provision, 18 U.S.C. 1084(b), which exempts from its coverage transmissions of "information" (but not of bets or of "communications" of the type prohibited by the third clause of subsection (a)) between States or countries where betting on the particular sporting event at issue is "legal." The conspiracy count in this case charged a conspiracy to violate all three clauses of Section 1084(a). Five of the substantive counts charged petitioner with substantive violations of all three clauses of Section 1084(a), and the jury, by special interrogatory, found petitioner guilty of violating all three clauses charged in those counts. The other two substantive counts charged only the transmission of "information."

At trial, petitioner's defense was that he acted in the belief that his conduct was lawful because it took place entirely in Antigua. He claimed that the placing of telephonic and Internet bets from the United States did not constitute the transmission of bets but rather directions to place bets. Petitioner argued that the transmission of such directions between jurisdictions in which sports betting is legal falls within the statute's "safe harbor" provision. Petitioner testified that, although he did not know whether placing bets on sporting events was legal in other States, he believed it was legal in New York. Gov't C.A. Br. 14.

With respect to the *mens rea* element of a Section 1084(a) offense, the district court instructed the jury that the government must prove only that petitioner "knew that the deeds described in the statute as being prohibited were being done," and that it did not have to

show that petitioner "knew that he was acting illegally under the statute." Pet. App. 13a; Gov't C.A. Br. 31. The court further explained that "ignorance of the law is no excuse." *Ibid.* The court instructed the jury to disregard the "safe harbor" provision of Section 1084(b), having found that it is inapplicable in this case. Pet. App. 7a.

3. On appeal, petitioner contended that the district court erred in instructing the jury that his good-faith belief in the legality of his conduct was not a valid defense to the conspiracy charge. He relied on *People* v. *Powell*, 63 N.Y. 88 (1875), which held that corrupt motive is an element of any conspiracy to commit an offense that is *malum prohibitum* rather than *malum in se*. The court of appeals observed that the so-called *Powell* doctrine was "echoed" in federal cases during the first half of the last century, but that the courts have since "moved away" from it. Pet. App. 5a. The court further noted that the American Law Institute's Model Penal Code had rejected the doctrine, and that, in *United States* v. *Feola*, 420 U.S. 671 (1975), this Court had held in another context that the federal conspiracy statute did not require proof of *scienter*. Pet. App. 6a-7a. The court concluded that "the *Powell* doctrine does not apply to a conspiracy to violate 18 U.S.C. § 1084." *Id.* at 7a.

Petitioner also challenged the district court's conclusion that the "safe harbor" provision is inapplicable in this case. He argued that betting on sports events is legal in both Antigua and New York, and that WSE's transmissions involved information assisting in the placing of bets rather than bets themselves. The court of appeals rejected both arguments. Pet. App. 8a-12a.

First, the court, citing to provisions prohibiting betting in the Constitution of New York State and in the

State's General Obligations Law, stated that "[t]here can be no dispute that betting is illegal in New York." Pet. App. 8a. The court was not persuaded by the argument that betting is "legal" in New York for purposes of Section 1084(b) because the State does not make it a crime. The court explained that, "[b]y its plain terms," the word "legal" means "permitted by law," and that betting is barred by law in New York regardless of whether it is punished criminally. *Ibid.* With respect to petitioner's argument that the transmissions did not involve bets but directions to place bets, the court of appeals explained that "[b]y making * * * requests and having them accepted, WSE's customers were placing bets." *Id.* at 12a. The court noted, however, that in light of its holding that betting is illegal in New York, the issue of whether the transmissions were of the type that are covered by the "safe harbor" provision was "immaterial." *Ibid.*

Finally, petitioner contended that the word "knowingly" in Section 1084(a) requires knowledge that one's conduct violates the statute, and therefore that the district court erred in instructing the jury that such knowledge is not an element of the offense. The court of appeals held that "[t]he district court was correct; it mattered only that [petitioner] knowingly committed the deeds forbidden by § 1084, not that he intended to violate the statute." Pet. App. 13a.

ARGUMENT

1. Petitioner renews his contention (Pet. 11-18) that the district court should have instructed the jury that, in order to convict him of conspiring to violate 18 U.S.C. 1084(a), it had to find that he had a "corrupt motive" in the sense that he had knowledge of the illegality of the underlying conduct. Relying on *People* v. *Powell*, 63

N.Y. 88, 92 (1875), and its progeny, he argues that when the object of the conspiracy is not clearly wrongful in itself but rather is wrongful solely by reason of a statutory prohibition, the government must prove not only an agreement to achieve that object but also a "corrupt motive." Even accepting *arguendo* petitioner's assumption that bookmaking is not wrongful in itself, the court of appeals correctly rejected petitioner's claim.

Petitioner's contention that the government must prove that the defendant had a "corrupt motive" in order to convict him for conspiracy is at odds with the language of the federal conspiracy statute, 18 U.S.C. 371. That statute makes it a crime to "conspire * * * to commit any offense against the United States." The statute says nothing about a "corrupt motive," nor does it otherwise contain any *mens rea* element separate from that required to commit the underlying offense itself. There is no sound reason why a "corrupt motive" should be an element of conspiracy where Congress has chosen not to make it an element of the underlying offense. See *United States* v. *Mack*, 112 F.2d 290, 292 (2d Cir. 1940) (L. Hand, J.) ("[I]t is hard to see any reason for [the *Powell* doctrine]").[1]

In *United States* v. *Feola*, 420 U.S. 671 (1975), the defendant was convicted of a Section 371 conspiracy to

---

[1] Petitioner argues (Pet. 14-15) that a "corrupt motive" requirement should be read into the conspiracy statute because at the time Congress reenacted it in 1948 the *Powell* doctrine was settled law. That is not so. This Court has never endorsed the doctrine, and in *Keegan* v. *United States*, 325 U.S. 478 (1945), four Justices went on record as disapproving it. *Id.* at 506 (Stone, J., dissenting). Nor had every court of appeals endorsed the doctrine. See, *e.g.*, *Hamburg-American Steam Packet Co.* v. *United States*, 250 F. 747, 759 (2d Cir.), cert. denied, 246 U.S. 662 (1918); *United States* v. *Mack*, 112 F.2d at 292.

assault a federal officer while the officer was engaged in the performance of his official duties. The underlying substantive offense, 18 U.S.C. 111, did not require knowledge that the intended victim was a federal officer. The issue before the Court was whether the government was nonetheless required to prove such knowledge under the conspiracy statute. The Court held that it was not, concluding that "where a substantive offense embodies only a requirement of *mens rea* as to each of its elements, the general federal conspiracy statute requires no more." 420 U.S. at 692. The Court relied for that conclusion chiefly on the language of the conspiracy statute itself, observing that "nothing on the face" of that statute would require greater knowledge on the part of those conspiring to commit an offense than is required to actually commit the offense. *Id.* at 687. The Court in *Feola* did not have occasion specifically to consider the question of whether the government must prove a "corrupt motive" where the underlying conduct is not wrongful in itself. See 420 U.S. at 691. Nevertheless, such a requirement is inconsistent with the statutory analysis in *Feola* and with its holding that a conspiracy offense requires the same *mens rea* as required to commit the underlying offense.

Since *Feola*, the courts of appeals, in reliance on that decision, have repeatedly rejected claims that a "corrupt motive" or knowledge of the law is an element of a gambling conspiracy. See *United States* v. *Blair*, 54 F.3d 639, 642-643 (10th Cir.) (conspiracy to violate Section 1084(a)), cert. denied, 516 U.S. 883 (1995); *United States* v. *Murray*, 928 F.2d 1242, 1251 (1st Cir. 1991); *United States* v. *Leon*, 534 F.2d 667, 674-675 (6th Cir. 1976); see also *United States* v. *Thomas*, 887 F.2d 1341, 1346-1347 (9th Cir. 1989) (holding that knowledge of the law is not an element of a conspiracy to engage in

"apparently innocent conduct"). No federal court of appeals has cited the *Powell* doctrine with approval since *Feola*. Nor do the standard jury instructions on conspiracy include an element of "corrupt motive." See, *e.g.*, Edward J. Devitt, *Federal Jury Practice and Instructions* § 28.03 (4th ed. 1990). And, as the court of appeals noted (Pet. App. 6a-7a), the American Law Institute rejected the *Powell* doctrine in its Model Penal Code. See 2 Model Penal Code and Commentaries, pt. 1, § 5.03 note on subsec. 1 & cmt. 2(c)(iii) (1985).

The only post-*Feola* circuit court decision petitioner cites (Pet. 12) is *United States* v. *Previte*, 648 F.2d 73 (1st Cir. 1981).[2] In that case the court stated that the defendant had invoked the *Powell* doctrine but that the doctrine was inapplicable on its own terms because the underlying substantive statute required "guilty knowledge." *Id.* at 81-82. Accordingly, the court, which took note of Judge Hand's criticism of the doctrine, did not have occasion to decide whether the doctrine was viable as a general rule of conspiracy law. Previously, in *United States* v. *Murray*, *supra*, the same court held that knowledge of the law is not an element of conspiracy to conduct a gambling business in violation of 18 U.S.C. 1955.[3]

---

[2] Chief Judge Bazelon's concurring opinion in *United States* v. *Barker*, 514 F.2d 208 (D.C. Cir.) (en banc), cert. denied, 421 U.S. 1013 (1975), the only other modern circuit court authority cited by petitioner (Pet. 12), was issued several days before the decision in *Feola*. In any event, that opinion did not refer to *Powell* as the law of the D.C. Circuit or any other court, and it noted that the doctrine had been criticized. 514 F.2d at 234 n.34.

[3] In his support, petitioner cites (Pet. 11-12) three court of appeals decisions from the early part of last century: *Cruz* v. *United States*, 106 F.2d 828 (10th Cir. 1939); *Landen* v. *United States*, 299 F. 75 (6th Cir. 1924); and *Fall* v. *United States*, 209 F. 547, 553 (8th

Nor is petitioner's cause aided by *Keegan* v. *United States*, 325 U.S. 478 (1945), which he also cites (Pet. 16-17). In *Keegan*, the defendants were convicted of conspiring to counsel evasion of the Secret Service Act by urging individuals to protest the draft and challenge its legality. A fragmented Court reversed the convictions not on the basis of the *Powell* doctrine, which the plurality and concurring opinions did not address, but because the defendants' agreement did not violate the underlying substantive statute. 325 U.S. at 495 (plurality opinion); *id.* at 495-498 (Black, J., concurring); *id.* at 498 (Rutledge, J., concurring). The only Justices to address the *Powell* doctrine were the four dissenters, who rejected it. *Id.* at 506 (Stone, C.J., dissenting) ("The doctrine of *People* v. *Powell* * * * has never been accepted by this Court.").

2. Petitioner contends (Pet. 18-22, 26-29) that the courts below erred in concluding that Section 1084(b)'s "safe harbor" provision is inapplicable in this case. That provision exempts from the statute's coverage transmissions limited to mere information that assists in the placing of bets (as opposed to transmissions of bets themselves), where "such betting" is "legal" both in the place of origin and the destination of the transmission. Petitioner argues that his activities satisfied both

---

Cir. 1913). Significantly, in post-*Feola* cases, the Sixth and Tenth Circuits have held that knowledge of the law is not an element of a gambling conspiracy. See *United States* v. *Leon*, *supra*, and *United States* v. *Blair*, *supra*. And, contrary to petitioner, *Fall* does not stand for the proposition that knowledge of the law is an element of conspiracy when the underlying conduct is not wrongful in itself; it stands for the proposition that, under the circumstances of that case, evidence of official misinformation as to the requirements of the law was admissible to negate fraudulent intent. 209 F. at 553.

elements of Section 1084(b)—that is, that betting is "legal" in New York State, the origin of the transmissions at issue here,[4] and that the transmissions did not involve bets but rather were limited to information assisting in the placing of bets.

a. Petitioner does not dispute that both the New York State Constitution and the State's General Obligation Law expressly prohibit betting. Rather, he argues (Pet. 18-22) that the word "legal" in the statute means "not criminal," and that no penal statute in New York State criminalizes the placing of a bet. That argument, however, is contrary to the ordinary understanding of the word "legal," which is "permitted by law." See *Webster's Third International Dictionary* 1290 (1993); *Black's Law Dictionary* 902 (7th ed. 1999). Moreover, the legislative history of Section 1084 confirms that Congress regarded New York as a State where betting is not "legal" within the meaning of the "safe harbor" provision. The House Report states that, although in Nevada it is "lawful to make and accept bets on [a horse] race held in * * * New York," it is "unlawful to make and accept bets in New York State on a [horse] race being run in Nevada." Accordingly, the Report continued, "the transmission of information assisting in the placing of bets and wagers from Nevada to New York would be contrary to the provisions of the bill." H.R. Rep. No. 967, 87th Cong., 1st Sess. 3 (1961).

Petitioner's reliance (Pet. 19-20) on *Sterling Suffolk Racecourse Ltd. Partnership* v. *Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir.), cert. denied, 510 U.S.

---

[4] It is undisputed that betting is legal in Antigua, the place of origin of the transmissions.

1024 (1993), is misplaced.[5] In that case, the defendant was an off-track betting facility in Rhode Island that accepted bets on horse races from distant tracks and broadcasted the races. The defendant would often neglect to secure the consent of the plaintiff, a Massachusetts track, as required by the Interstate Horseracing Act of 1978 (IHA), 15 U.S.C. 3001-3007. The plaintiff sought an injunction against the off-track betting facility under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, alleging that the facility was engaged in a pattern of racketeering activity by violating Section 1084(a) through its noncompliance with the IHA. The court of appeals denied the RICO injunction. In so doing, it noted that because the off-track betting facility's business was legal under the laws of all interested States, it fell under the "safe harbor" provision of Section 1084(b). 989 F.2d at 1273. The court further noted that, in enacting the IHA, Congress had only created a private cause of action for damages on the part of certain parties and did not intend that there be government enforcement. Consequently, the court concluded that the plaintiff could not use the IHA to avoid the applicability of the "safe harbor" provision—that is, "to transform an otherwise legal OTB business into a criminal racketeering enterprise." Pet. App. 9a. The court was not confronted with and did not consider the question whether, for purposes of Section 1084(b), placing a bet is "legal" in a State that specifically prohibits it by statute but does not attach criminal penalties to the prohibition. As the court below observed, "*Sterling* [does not] * * * demonstrate[] that Congress intended

---

[5] None of the other cases relied on by petitioner (Pet. 20-21) involves Section 1084(b) nor the meaning of the word "legal."

for § 1084(b) to mean anything other than what it says." *Id.* at 10a.[6]

b. Nor can petitioner satisfy the second element of the Section 1084(b) exemption—that, under WSE's account-wagering system, the transmissions from WSE's customers in New York involved only instructions to place bets rather than bets themselves. In each telephone conversation at issue the bettor asked if he could place a bet, a WSE operator confirmed that he could, and the bettor then specified the amount and

---

[6] In any event, the safe harbor would not apply in this case because, while it is true that the placing of a bet is not a crime in New York State, the process of "betting" through a bookmaker is a crime. It is a misdemeanor to "knowingly advance[] or profit[] from unlawful gambling activity," such as betting on sports that is not specifically authorized by law, N.Y. Penal Law § 225.05 (McKinney 2000), and it is a felony to do so and "receive[] or accept[] in any one day more than five bets totaling more than five thousand dollars," *id.* § 225.10. An individual "'advances gambling activity' when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity," *id.* § 225.00(4), and an individual "'profits from gambling activity' when, other than as a player, he accepts or receives money * * * pursuant to an agreement or understanding * * * whereby he participates or is to participate in the proceeds of gambling activity," *id.* § 225.00(5). The cited criminal prohibitions apply only to someone who is not a "player," defined as a "contestant or bettor" who receives no profit other than "personal gambling winnings" and does not "render[] any material assistance to the establishment, conduct, or operation of the particular gambling activity." *Id.* § 225.00(3). See generally *People ex rel. Vacco* v. *World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 851 (Sup. Ct. 1999) (relying on above statutes). In other words, according to New York law, the placing of a bet with a party who is to earn a profit—a bookmaker—necessarily gives rise to a crime, in which the bookmaker, but perhaps not the bettor, is the criminally liable party.

terms of the bet, which the operator accepted and confirmed on the spot. The bets placed over the Internet were fully consummated upon the bettor's click of a button labeled "place wager" and the bettor's receipt of an automatic, immediate confirmation. As the court of appeals correctly concluded, under that procedure, "WSE's customers were placing bets." Pet. App. 12a; see *United States* v. *Tomeo*, 459 F.2d 445, 446 (10th Cir.) ("When a person holds himself out as being willing to make bets or wagers over interstate telephone facilities, and does in fact accept offers of bets or wagers over the telephone as part of his business, we think it is consistent with both the language and the purpose of [Section 1084(a)] to hold that he has 'used' the facility for the transmission of bets or wagers.") (quoting *Sagansky* v. *United States*, 358 F.2d 195 (1st Cir.), cert. denied, 385 U.S. 816 (1966)), cert. denied, 409 U.S. 914 (1972).

The distinction between bets and "information" potentially exempt under Section 1084(b) was correctly described by the district court in *United States* v. *Ross*, No. 98 CR 1174-1 (KMV), 1999 WL 782749, *5 (S.D.N.Y. Sept. 16, 1999):

> [The distinction is] between transmissions constituting an individual gambling transaction—those necessary to effect a particular "bet or wager"—and transmission of "information" that merely "assists" a potential bettor or bookmaker. Such "information" would include knowledge that may influence whether, with whom, and on what terms to make a bet. Thus transmissions reporting the results of sporting events, the odds placed on particular contests by odds-makers, or the identities of persons

seeking to place bets would be examples of "information."

Petitioner draws a distinction (Pet. 27-28 & n.14) between the "account wagering" system employed by WSE and what could be called "credit wagering," claiming that the former is protected by Section 1084(b). But under both systems the bettor transfers no money, only a request to place a bet. And under the "credit wagering" system, the bookmaker's acceptance of a bet is dependent on the amount of credit available to the bettor, in the same way that WSE's acceptance of a bet was dependent on the amount of cash in the bettor's account. Petitioner's reading of the law, therefore, would equally exclude both forms of betting, thereby placing outside the definition of "betting or wagering" every traditional form of placing and receiving bets.

The cases relied on by petitioner are not to the contrary. In *United States* v. *Truesdale*, 152 F.3d 443, 448 (5th Cir. 1998), the court found that the jury could not properly infer that bets were sent or received in Texas solely from evidence that two toll-free numbers used by the organization terminated in that State, because there were other toll-free "betting lines" that terminated elsewhere. In the older cases of *Lescallett* v. *Commonwealth*, 17 S.E. 546, 548 (Va. 1893), and *McQuesten* v. *Steinmetz*, 58 A. 876, 877 (N.H. 1904), the courts held that orders for an intermediary to place bets with a bookie were not themselves completed betting contracts because the intermediaries did not accept the bets or otherwise bind themselves to pay the bettors. And in *Saratoga Harness Racing, Inc.* v. *City of Saratoga Springs*, 55 A.D.2d 295, 296 (N.Y. 1976), the court concluded that the fact that an off-track bet is taken by telephone from a person in the City of

Saratoga does not establish that betting is conducted in Saratoga for purposes of subjecting the off-track betting corporation to taxation in that county. None of these cases implies that a bet may not be transmitted from one location to another. To the extent that they recognize the general principle that a contract is reached by an offer and an acceptance, they do not help petitioner, since the proof against him showed a two-way wire transmission of both an offer to bet and WSE's acceptance of the offer.[7]

c. Even if the placing of bets by means of WSE's toll-free telephone lines and Internet site did not consti-

---

[7] Petitioner argues (Pet. 27-29) that if the transmissions at issue consisted of "bets or wagers" in violation of Section 1084(a), then so do out-of-state telephone or electronic contacts with state-authorized OTB facilities for the purpose of placing a bet. He points out (Pet. 28 & n.15) that during 2000, Congress amended the IHA to regulate interstate "wagers" with state OTB facilities when lawful in each State involved (see 15 U.S.C. 3002(3)), suggesting that Congress viewed such wagers as legal. Petitioner concedes, however, that the interstate transmission of "wagers" is not exempted by the "safe harbor" provision; his argument is that WSE did not receive "bets or wagers," only instructions on their placement. The presidential signing statement accompanying the amendment made clear that, in the view of the Department of Justice, the amendment was not intended to alter or repeal Section 1084 or to legalize "interstate account wagering" even where lawful in the States involved. *Statement by President William J. Clinton Upon Signing H.R. 4942*, 36 Weekly Comp. Pres. Doc. 3153 (Dec. 21, 2000). In addition, to the extent that the amendment suggests that certain interstate wagers with state OTB facilities might be lawful, it applies strictly to wagers on horse races; WSE took bets on other types of sporting events, not on horse races. Finally, any conflict between the 2000 amendment and Section 1084, which was enacted by a different Congress almost 40 years earlier, could not help petitioner, since the conduct for which he was convicted occurred before the enactment of the amendment.

tute the transmission of "bets or wagers," petitioner cannot escape the jury's independent determination with respect to five of the counts on which he was convicted that the bet-placement transmissions involved a communication "which entitles the recipient to receive money or credit as a result of bets or wagers" in violation of the third clause of Section 1084(a). See p. 3, *supra*.[8] Like violations of the first clause of the statute, violations of the third clause are not subject to the "safe harbor" provision of Section 1084(b). Whether or not the transmissions consisted only of "instructions to bet," once a bet was accepted and confirmed in the very same two-way communication, a contract was formed entitling WSE, "a recipient" of the communication, to "money or credit as a result of bets or wagers"—that is, to its percentage of the bet no matter the outcome of the sporting event.

3. Petitioner contends (Pet. 22-26) that a defendant's good-faith belief that he was not transmitting "bets or wagers" is a defense to a Section 1084(a) charge, and that the district court should have instructed the jury accordingly. He relies on the language in the statute requiring the offense to be committed "knowingly."

Petitioner does not purport to argue that ignorance of the law is a defense to a substantive Section 1084(a) charge. See Pet. 23-26. Rather, he argues that a person cannot "knowingly" violate Section 1084(a) without believing that the conduct in which he engaged was

---

[8] Petitioner's convictions on the remaining two counts, which did not charge a violation of the third clause of Section 1084(a), are of no practical consequence, since the sentences on each count on which petitioner was convicted are concurrent and petitioner's sentencing range under the Sentencing Guidelines was effectively determined by the other five counts.

prohibited by the statute. But that is just another way of framing an "ignorance of the law" defense.

As this Court has held, "ignorance of the law or a mistake of law is no defense to criminal prosecution." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). Of course, Congress may supplant that general rule by making knowledge that the charged conduct is an unlawful element of the offense, and Congress's use of the term "willfully" has that effect in certain contexts. See *Bryan* v. *United States*, 524 U.S. 184, 193 (1998). The word "knowingly," however, "merely requires * * * knowledge of the facts that constitute the offense," not knowledge that the prohibited conduct is unlawful. *Ibid.* Consistent with those principles, the Tenth Circuit has held that knowledge of the statutory prohibition is not an element of a Section 1084(a) offense. *United States* v. *Blair*, 54 F.3d at 642.

Petitioner's reliance (Pet. 23) on *Cohen* v. *United States*, 378 F.2d 751, 756 (9th Cir.), cert. denied, 389 U.S. 897 (1967), is unavailing. In that case, the court of appeals held that, in a prosecution under Section 1084(a), the defendant should be presumed to know the law but that he may rebut the presumption with proof of his ignorance. *Id.* at 756-757. In reaching that conclusion, the court did not engage in any analysis of the relevant statutory language. Rather, it reasoned that betting is legal in Nevada, and that the rebuttable presumption of knowledge afforded those "innocent of intentional wrongdoing" a defense without impeding the statute's purpose of discouraging professional interstate gambling. *Id.* at 756. *Cohen*, however, predated this Court's recent interpretations of the word "knowingly" in *Bryan* and other cases. Significantly, in a much more recent case, the Ninth Circuit rejected the rationale of its prior decision in *Cohen* (without citing

that case) in holding that knowledge of the law is not an element of the offense of transporting wagering paraphernalia in interstate commerce, in violation of 18 U.S.C. 1953. *United States* v. *Mendelsohn*, 896 F.2d 1183, 1188 (9th Cir. 1990). In light of subsequent decisions, there is serious doubt about the continuing force of *Cohen* in the Ninth Circuit.

Petitioner cites (Pet. 24-25) *Liparota* v. *United States*, 471 U.S. 419 (1985), and *Morissette* v. *United States*, 342 U.S. 246 (1952), for the proposition that the word "knowingly" may require knowledge of the law. In *Liparota*, the Court held that in a prosecution under 7 U.S.C. 2024(b)(1), which makes it a crime "knowingly" to possess or acquire food stamps "in any manner not authorized by [the statute] or the regulations," the government must show that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by law. 471 U.S. at 423-434. Subsequently, in *Bryan* v. *United States*, 524 U.S. at 193 n.15, the Court explained that it had reached that result based on the fact that the term "knowingly" in Section 2024(b)(1) "literally referred to knowledge of the law," 524 U.S. at 193 n.15, by virtue of the "in any manner" clause quoted above. Section 1084(a) does not contain equivalent language.

Nor is petitioner helped by *Morissette*. In that case the defendant was convicted of stealing spent bomb casings from federal property in violation of a statute making it unlawful to "knowingly convert[]" property of the United States. The trial court instructed the jury that criminal intent could be predicated on the isolated act of taking the property without more. This Court held that the instruction was error because the defendant might have thought that the property was abandoned. 342 U.S. at 276. The Court explained that a

"knowing conversion" requires "knowledge of the facts, though not necessarily the law, that made the taking a conversion." *Id.* at 270-271. Accordingly, *Morissette* does not support petitioner's construction of the word "knowingly" to require knowledge of the law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

MAY 2002